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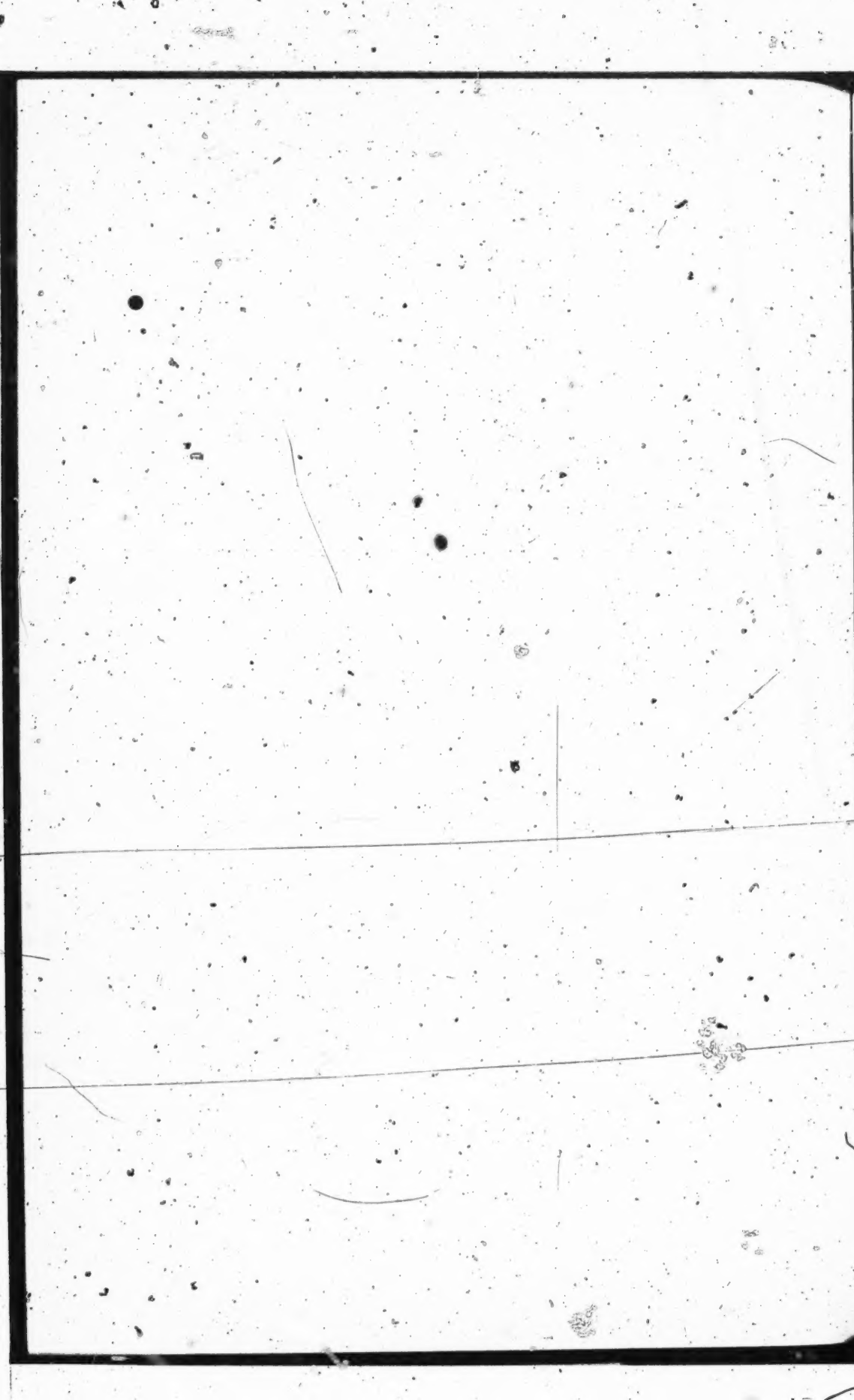

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

MISSOURI STATE LIFE INSURANCE COMPANY,
A CORPORATION, AND
HARTFORD ACCIDENT & INDEMNITY COMPANY,
A CORPORATION ..... *Petitioners,*

v.

MARION JOHNSON ..... *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Missouri State Life Insurance Company, a corporation, and Hartford Accident & Indemnity Company, a corporation, respectfully pray that a writ of certiorari issue to review the judgment entered November 14, 1932, in the Supreme Court of Arkansas in the above entitled cause. A seasonably filed petition for rehearing in said cause was denied December 12, 1932, on which date said judgment became final and effective. Upon applica-

tion seasonably made on March 10, 1933, by the petitioners to Associate Justice Butler, of this Honorable Court, an order was signed by the said Justice extending the time within which petitioners might apply for a writ of certiorari in this cause for a period of thirty (30) days from said March 10, 1933.

OPINIONS BELOW

The judgment of the Hot Spring Circuit Court (R. 24) is not reported. The opinion of the Supreme Court of Arkansas (R. 42) is not reported.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered November 14, 1932 (R. 41, 42). A seasonably filed petition for rehearing in said cause in said court was denied December 12, 1932 (R. 48). The filing of this petition stayed all proceedings under the judgment as to both Missouri State Life Insurance Company, the defendant, and the Hartford Accident & Indemnity Company, the surety on the supersedeas bond. Section 2171 of Crawford & Moses' Digest of the Statutes of Arkansas, among other things, provides that no mandate shall issue and that no decision of the Supreme Court of Arkansas shall "become final until after fifteen judicial days from the time the decision was rendered unless the court, for good cause shown, shall otherwise direct. If a petition for rehearing be filed before the time for the decision to become final as above specified, all proceedings upon the decision and mandate therein shall be suspended until said petition for rehearing shall be acted upon by the court. * * *"

Thereafter, upon application seasonably made, on March 10, 1933, by petitioners to Associate Justice Butler

of this Honorable Court, an order was signed by the said Justice extending the time within which petitioners could apply for a writ of certiorari in this cause for a period of thirty days from said March 10, 1933.

The jurisdiction of this court is invoked under Section 344, Title 28, United States Code Annotated (Section 237, Judicial Code).

QUESTION PRESENTED

The question in this case is whether an attorney's fee for the plaintiff imposed by a State statute should be considered in determining the amount in controversy essential to a removal to the Federal Court. The court below has decided that Federal question in a way probably not in accord with applicable decisions of this court.

STATUTE INVOLVED

Section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas is set forth in the subdivision next following.

STATEMENT OF FACTS

Respondent, a citizen of Arkansas, brought suit against petitioner, Missouri State Life Insurance Company, a Missouri corporation, on an accident policy for $1,000, and a life policy for $2,000, making a total of $3,000 (R. 4-8).

Section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas provides:

> "In all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor, shall fail to pay the same within the time specified in

> the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent damages upon the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of said loss; said attorney's fee to be taxed by the court where the same is heard on original action, by appeal or otherwise and to be taxed up as a part of the costs therein and collected as other costs are or may be by law collected. Act March 29, 1905, p. 307."

To avoid a removal, the respondent waived the twelve per cent penalty, but insisted on the attorney's fee (R. 9, 10).

After due notice, petitioner filed a petition for removal on the ground of diversity of citizenship, alleging that the lowest reasonable attorney's fee would be $250, that such fee was not costs within the meaning of the removal act, and that the amount in controversy was therefore in excess of $3,000 (R. 10-13). A bond in due form was filed (R. 13-15).

The trial court denied the petition for removal and awarded an attorney's fee of $550, which was taxed as costs (R. 15-16). This judgment was affirmed by the Supreme Court of Arkansas, and a joint judgment was entered against the Missouri State Life Insurance Company and the Hartford Accident & Indemnity Company, the latter being surety on the supersedeas bond (R. 41). Both of these parties are petitioners herein.

ARGUMENT AND AUTHORITIES

It seems to us that this question is settled by the decision of this court in *People of Sioux County, Nebraska,* v. *National Surety Company,* 276 U. S. 238, where it was held:

> "The attorney's fees which are directed by Sec. 7811, Nebraska Comp. Stats., 1922, to be allowed and 'taxed as a part of the costs,' in actions on guaranty and other specified insurance contracts, are not costs in the ordinary sense and are not taxable as costs under Rev. Stats., Secs. 823, 824, in actions in Federal courts, but are to be allowed in those courts by inclusion in their judgments. P. 242."

We submit that there is no magic power in the formula, "to be taxed as costs," that would change what is intended as a penalty for resisting a just demand into something else. In *Fidelity Mutual Life Ass'n* v. *Mettler,* 185 U. S. 308, and *Home Life Insurance Co.* v. *Fisher,* 188 U. S. 726, the statute imposing the attorney's fee did not provide that it should be taxed as costs. In *People of Sioux County, Nebraska,* v. *National Surety Company,* 276 U. S. 238, that formula was used, but this court held that it made no difference. On page 242, the court said:

> "The present statute, printed in the margin, provides that in the cases specified the court 'shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as a part of the costs.' The direction that the added liability be included in the judgment as costs does no more in substance than the provision upheld and applied in the Mettler case, that the insurance company 'shall be liable to pay * * * all reasonable attorney's

fees,' or the provision upheld and applied in *Home Life Insurance Co.* v. *Fisher, supra,* that the attorney's fees should be added to the judgment."

On the same page the court says:

"In these cases the local statutes were, in effect, treated as creating a statutory liability in which insurers, *by accepting risks after their enactment had acquiesced,* and for the liability thus assumed a remedy was available in the Federal as well as in the State courts. *Fidelity Mutual Life Ass'n* v. *Mettler, supra,* at 326."

The law enters into and forms a part of all contracts, and the provision for attorney's fees has largely been sustained upon the ground that a foreign corporation on entering a State accepts its laws.

This is further emphasized on page 243, where we find this statement:

"Whether this liability for an attorney's fee, *assumed by entering into an insurance contract after the enactment of the statute providing for the liability,* may be enforced in the Federal courts does not depend on any nice distinctions which may be taken between the right created and the remedy given. Disregarding mere matters of form it is clear that it is the policy of the State to allow plaintiffs to recover an attorney's fee in certain cases, and it has made that policy effective by making the allowance of the fee mandatory on its courts in those cases."

In *American Liberty Insurance Company* v. *Washington,* 183 Ark. 497, the Supreme Court of Arkansas, in speak-

ing of this statute, said: "The statute became a part of the contract of insurance."

In *People of Sioux County* v. *National Surety Company, supra,* the distinction between "costs" in the sense in which that word is used in the removal acts, and attorney's fees allowed the plaintiff, is clearly expressed at page 243:

> "That the statute directs the allowance, which is made to plaintiff, to be added to the judgment as costs are added does not make it *costs* in the ordinary sense of the traditional, arbitrary and small fees of court officers, attorneys's docket fees and the like, allowed to counsel by R. S. Secs. 823, 824.
>
> "The present allowance, since it is not costs in the ordinary sense, is not within the field of costs legislation covered by R. S. Secs. 823, 824. That the particular mode of enforcing the right provided by the state statute—*i. e.,* by taxing the allowance as costs—is not available to the Federal courts under R. S. 823, 824, does not preclude the recovery."

We submit that merely calling a penalty "costs" does not change its nature.

That the attorney's fee is a penalty for an improper defense has been decided by this Court and by the Supreme Court of Arkansas.

In the case of *Vaughan* v. *Humphreys,* 153 Ark. 140, the court said:

> "The attorney's fee is a penalty given to reimburse the policy-holder for expenses incurred in enforcing the contract of indebtedness, and is taxed as

costs in the case. *Arkansas Ins. Co.* v. *McManus*, 86 Ark. 115, and *Mutual Life Ins. Co.* v. *Owen*, 111 Ark. 554. 'Hence the attorney's fee is part of the recovery of the policy-holder against the insurance company.'' In *C. & N. W. Ry.* v. *Nye*, 260 U. S. 43, this court says:

"'* * * that the reasonable payment of just claims against them for faulty performance of their functions is a part of their duty, and that a reasonable penalty may be imposed on them for failure promptly to consider and pay such claims, in order to discourage delays by them. *This penalty or stimulus may be in the form of attorney's fees.*''

In *Kansas City Southern Ry. Co.* v. *Marx*, 72 Ark. 357, 359, it is said:

"Statutes allowing attorney's fees to be taxed against railway companies where judgments are recovered against them for the violation of statutory regulations are upheld on the ground that *such a fee is in the nature of a penalty* imposed upon the company for failure to comply with the police regulations of the state.''

In *St. Louis-Southwestern Ry. Co.* v. *Knight*, 81 Ark. 431, it is said:

"In *Kansas City So. Ry. Co.* v. *Marx*, 72 Ark. 357, we said that the Legislature could not discriminate against railroad companies and tax them with attorney's fees when other litigants were not subjected to such liabilities, but that they could authorize them to be taxed with attorney's fees in judgment against them for violating statutory regulations, *the fee in such a case being a part of the penalty* for violating the statute.''

We cannot find that this question of removability has ever been before any of the Circuit Courts of Appeal, but in *Business Men's Assurance Co.* v. *Campbell,* 18 Fed. (2d) 225, in speaking of a similar statute of Nebraska, the Circuit Court of Appeals for the Eighth Circuit says:

> "It is beyond question that this act was not intended to make such allowances ordinary costs as are fees of court officers or attorney's docket fees."

The Supreme Court of Arkansas concedes that if the attorney's fee is a penalty it must be added to the face of the policy to determine removability. In *Mutual Life Insurance Co.* v. *Marsh,* 185 Ark. 332, the court holds:

> "The amount in controversy in an action on an insurance policy for $3,000 plus 12 per cent. penalty is $3,360, which entitled the defendant, a nonresident, to removal of the cause to the Federal Court, under tit. 28, Sec. 71, U. S. C. A."

We find that four district judges have passed on the question whether attorney's fees should be considered in determining the amount for removal. The cases are equally divided, but they were all before the decision in *People of Sioux County, Nebraska,* v. *National Surety Co.,* 276 U. S. 238.

Rogers v. *Riley,* 80 Fed. 759.

Swofford v. *Cornucopia Mines,* 140 Fed. 957.

Peters v. *Queen Insurance Co.,* 182 Fed. 113.

Connor v. *Connecticut Fire Ins. Co.,* 292 Fed. 767.

The jurisdiction of courts of the United States, whether in original suits or upon removal, has always depended upon the amount in controversy, "exclusive of costs." It

was so in the Judiciary Act of 1789, and the same language appears in each re-enactment thereof. The costs there referred to are defined in *People of Sioux County* v. *National Surety Co.*, 276 U. S. 238, 243, as "the traditional, arbitrary and small fees of court officers, attorney's docket fees and the like, allowed to counsel by R. S. Secs. 823, 824." If "costs" are thus defined in the present Judiciary Act; the word must have had that significance in all the judiciary acts preceding.

This court takes judicial notice of the laws of all the states, and it knows that these state statutes allowing attorney's fees against corporations as a penalty for delay in paying claims are of comparatively modern origin. No such acts were in existence when the word "costs" was first used in defining federal jurisdiction, and such statutes could not have been in the mind of Congress when it excluded costs from the amount involved.

REASONS FOR GRANTING WRIT

The Supreme Court of Arkansas has decided this important question, pertaining to the right to remove cases to the Federal Courts, in a way probably in conflict with applicable decisions of this Court.

WHEREFORE, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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